SUPREME COURT, U. S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 274

K. B. & J. YOUNG'S SUPER MARKETS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PRELIMINARY STATEMENT

This is a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment enforcing an order of the National Labor Relations Board. (157 N.L.R.B. No. 17.) The judgment of the Court of Appeals is dated April 28, 1967. It was entered the same date. Copies of the opinion of the Court of Appeals and its decree are appended hereto. The opinion is reported in .....

F.2d ..... and in 55 LC No. 11,878. Rehearing was not requested. Jurisdiction of this court rests upon Sections 10(e) and 10(f) of the National Labor Relations Act (29 U.S.C. § 160(e), et seq.) and upon Section 1254 of Title 28 United States Code.

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Is the purchaser of a unionized business free to hire his own employees, or is he required to bargain with the collective bargaining representative of the seller's employees regarding the continuity of their employment?

2. What is, or what are the criteria for, "substantial continuity of identity in the business enterprise", within the meaning of *John Wiley & Sons v. Livingston*, 376 U. S. 543 (1964)?

STATUTES INVOLVED

The statutory provisions which this case involves are portions of the National Labor Relations Act, as amended (29 U.S.C. § 151, et seq.) and are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to en-

gage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer——

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

STATEMENT OF THE CASE

In April, 1964, William Young and Charles John Young, who are brothers, purchased from Hob Nob Stores, Inc., d/b/a Kelley's Markets, three retail supermarkets in Bakersfield, California. Hob Nob operated thirty other supermarkets and was part of a large corporate complex. (Tr. 243-244.) The Youngs organized a corporation, petitioner herein, to operate

the stores. (Tr. 283.) At the request of the Youngs, Hob Nob terminated its employees. (Tr. 247.) Hob Nob closed the stores. (Tr. 249.) The stores remained closed for a day and reopened the following day under the Youngs' management.

The three stores were operating at a loss at the time of the sale. (Tr. 284.)

Hob Nob had a collective bargaining agreement with Butchers Union Local 193, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. The agreement covered the meat department employees in the three stores purchased by the Youngs and was effective until January, 1965. (G. C. Exh. No. 2.) However, Local 193 had not been certified as the collective bargaining representative of the employees. (Tr. 274-275.)

The Youngs hired new employees and new supervisors. (One Hob Nob grocery department supervisor was retained, but none in the meat department.)

After the sale Local 193 requested petitioner to honor the agreement. Upon Petitioner's refusal to do so, Local 193 first requested arbitration (G. C. Exh. No. 4) but later withdrew the request and invoked the processes of the National Labor Relations Board.

The General Counsel of the National Labor Relations Board charged in a consolidated complaint (R. 10) that petitioner had caused Hob Nob to discharge its employees because petitioner desired to avoid Hob Nob's collective bargaining obligations, that petitioner had failed to recall the employees, that it was the

"successor" to Hob Nob for the purposes of the National Labor Relations Act, and that it had refused to bargain with Local 193.

The General Counsel's contentions were accepted by the Board. (R. 52.) The discharges were found to violate § 8 (a) (3) of the National Labor Relations Act, and the refusal to bargain to violate § 8 (a) (5). (29 U.S.C. § 158 (a) (3), (5).) The remedy ordered was reinstatement with back pay for the discharged Hob Nob employees and recognition of and bargaining with the union.

The Board's order is based on its finding that petitioner violated the Act by causing the discriminatory discharge of Hob Nob employees. The Board made no finding of mass discriminatory refusal by petitioner to hire Hob Nob employees who applied to it for employment.

Petitioner argued in the Court of Appeals that it was free to hire its own employees and that its decision to do so rather than to continue *en masse* the employment of Hob Nob's employees was a matter of management prerogative irrespective of motive. Petitioner also argued that since it employed none of Hob Nob's employees in the appropriate unit, it was not Hob Nob's "successor" within the meaning of the Act. Petitioner pointed out that it neither had been charged with nor found to have committed (except in a single instance) discriminatory refusal to hire.

The Court of Appeals rejected petitioner's arguments, reasoning that under the doctrine of *John*

Wiley & Sons v. Livingston, supra, the right to continued employment does not automatically terminate on change in ownership and that petitioner was obligated to bargain with Local 193 regarding the continuity of employment. It also reasoned that since the Hob Nob employees were entitled to continuity of employment petitioner could not argue that it was not Hob Nob's "successor" because it had not employed them.

The Court of Appeals had jurisdiction pursuant to the provisions of Sections 10(e) and 10(f) of the National Labor Relations Act (29 U.S.C. § 160(e), et seq.)

ARGUMENT

Whether the purchaser of a business is required to bargain collectively with the collective bargaining representative of the seller's employees regarding continuity of employment of the seller's employees presents an important question of federal law which has not been, but should be, settled.

Plainly stated, the holding of the Court of Appeals in this case is that a purchaser purchases the seller's contractual obligations with respect to the seller's employees and is not free to hire his own employees. The Court of Appeals concluded that the purchaser is not entitled to request the seller to terminate its employees upon the sale, or at least is not entitled to

request that in order to avoid the seller's union obligations.

Petitioner submits that the Court of Appeals has placed an unnecessary, and in some cases fatal, restraint on the free alienation of business enterprises or parts thereof. As stated by Member Jenkins of the National Labor Board, dissenting in *Chemrock Corporation,* 151 NLRB No. 111 (1965):

> "If a prospective buyer is not free to structure a new enterprise in such manner as will in his judgment convert a failing or non-profitable operation into a competitive and profitable venture, the likelihood that a business may be shut down or sharply curtailed by the prospective seller becomes greater. Compelling a purchaser to hire the employees of the seller further encumbers stagnant and unprofitable enterprises by reducing the flexibility available to prospective buyers and tends to foreclose any rejuvenation which might result from sales to new owner-managers."

If the buyer cannot eliminate objectionable economic restrictions of the seller's operation he likely will not make the purchase, and in many cases, this will leave the seller to plod along to a certain death.

It has been recognized that some employer decisions are so peculiarly matters of management prerogative that they may be made without violating the Act no matter what the motivation. *Textile Workers v. Darlington Mfg. Co.,* 380 U.S. 263 (1965). See also *N. L. R. B. v. New England Tank Industries,* 302

F.2d 273, 276 (C.A. 1, 1962); *Jays Foods Inc.*, 292 F.2d 317, 320 (C.A. 7, 1961). Absent a finding of discriminatory refusal to hire applicants for work, a decision by a purchaser to hire his own work force is or should be such a matter.

In many cases the experience of the seller's employees will be more important to the buyer than the restrictions of the seller's contractual obligations. In such cases, the buyer will hire the seller's employees. However, in other cases the restrictions, if unavoidable, will prevent the buyer from "getting off the ground", so to speak, to begin with.

The effect of petitioner's contention would be to strike a balance between the interests of management and labor. In purchasing a business management could make a management decision to retain the employees of the seller, as such, or to hire a new work force. The restrictions of § 8 (a) (3) of the Act would prevent management from discriminating between union and non-union applicants for employment. Other provisions of the Act would afford labor the opportunity to organize the work force hired and to represent it upon majority designation.

Petitioner's contention has been recognized by the Board in the past. In *Tennsco Corp.*, 141 NLRB No. 21 (1963), the Board adopted the conclusion of its Trial Examiner that a purchaser "had no duty to hire any particular employees", and in *Bedford-Nugent Corp.*, 151 NLRB No. 26 (1965), it concluded that the

purchasers "were not obliged to give preference to the former Bedford-Nugent employees over other or subsequent applicants for employment".

Although the right to life, liberty, and the pursuit of happiness includes the right to work and earn an honest living, it does not include the right to work for any particular employer without his consent since a man's right to work stops short of the employer's right not to hire him. *Van Zandt v. McKee,* 202 F.2d 490 (C.A. 5, 1953).

If petitioner was free to elect to hire its own work force, and it did so, was there nonetheless a "substantial continuity of identity in the business enterprise" within the meaning of *John Wiley & Sons v. Livingston,* supra?

The principle of *Wiley,* a corporate merger case, is that consistent with the federal policy of settling labor disputes by arbitration rather than by tests of strength of contending forces, a "successor employer" is, in appropriate circumstances, bound by the arbitration clause of a collective bargaining agreement signed by the predecessor employer. The appropriate circumstances are "continuity of identity in the business enterprise". To date, however, the Court has neither clearly defined the concept nor laid down any indispensable criteria of continuity. The matter is one of continuing concern to practitioners representing both labor and management. It is of particular concern since in *Wackenhut Corp. v. Plant Guard*

Workers, 332 F.2d 954 (C.A. 9, 1964), and *Steelworkers v. Reliance Universal,* 335 F.2d 891 (C.A. 3, 1964), the *Wiley* doctrine was applied by Courts of Appeals to purchase, rather than merger, situations, and since the decision of the Court of Appeals herein applies it to representation as well as arbitration despite the admonition of the Court in *Wiley* that "we do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in owership". (376 U.S. 543, at 551.)

Petitioner submits that one indispensable criteria of continuity is employment by the "successor" of at least a significant number of the employees of the predecessor. Cf. *Hotel & Restaurant Employees v. Joden,* ..... F. Supp. ....., 54 LC No. 11,679 (Dist. Mass., Dec. 30, 1966.) In other words one is not a successor if he has none of the employees of his predecessor. While the type of the business may remain unchanged (i.e. grocery store, restaurant or manufacturing plant), the *raison d'etre* of the Act is the employer-employee relationship. That relationship is a most important element in determining continuity. *N. L. R. B. v. Alamo White Truck Service,* 273 F.2d 238, 242. (C.A. 5, 1959.) If there is a change in that relationship, then it would seem that there has been a break in continuity.

Numerous decisions by the Board have required a purchaser to bargain with the representative of the

seller's employees. In such cases the seller's employees became the buyer's employees. In most of the cases there was no change in supervision. *Chemrock Corporation,* supra; *Randolph Rubber Co.,* 152 NLRB No. 46 (1965); *Hemisphere Progressive Corp.,* 154 NLRB No. 65 (1965); *Paramount Paper Products,* 154 NLRB No. 89 (1965); *Sinko Mfg. & Tool Co.,* 154 NLRB No. 117 (1965); *West Suburban Transit Lines,* 157 NLRB No. 77 (1966); and *William E. McClain,* 158 NLRB No. 18 (1966).

However, where the seller's employees did not become the buyer's employees, the result has been to the contrary. *Triumph Sales, Inc.,* 154 NLRB No. 71 (1965); *San Francisco Metal Products,* 155 NLRB No. 27 (1965); and *Alabama Precast Products Co., Inc.,* 163 NLRB No. 99 (1967).

In *N. L. R. B. v. John Stepp's Friendly Ford, Inc.,* 338 F.2d 833 (C.A. 9, 1964), a substantial change of identity in the work force precluded a purchaser of a business from being a successor employer. *Stepp's Friendly Ford* is distinguished by the Court of Appeals on the grounds that herein the discharge of the seller's employees was an unfair labor practice. That is true, however, only if petitioner was not free to elect to hire its own work force.

If a buyer purchases the seller's contractual obligations with respect to the seller's employees and is not free to avoid those obligations by hiring his own employees, the basic premise of the Court of Appeals in this case, then as a practical matter, almost every

purchaser of a going unionized business is a "successor" *ipso facto*. The result has wide implications, and again, presents an important question of federal law which should be settled.

Dated, Coalinga, California,
May 22, 1967.

Respectfully submitted,
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(Appendix Follows)